

## CHAPTER 1: SCOPE AND AGENCY RESPONSIBILITIES

Maryland's Public Information Act ("PIA"), Title 10, Subtitle 6, Part III of the State Government Article ("SG"), grants the public a broad right of access to records that are in the possession of State and local government agencies. It has been a part of the Annotated Code of Maryland since its enactment as Chapter 698 of the Laws of Maryland 1970 and is similar in purpose to the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552, and the public information and open records acts of other states.

The basic mandate of the PIA is to enable people to have access to government records without unnecessary cost or delay. Custodians have a responsibility to provide such access unless the requested records fall within one of the exceptions in the statute.

Public information statutes such as the PIA expand the common law right of the public to inspect government records. An appellate court of one of the states defined the common law right as follows:

[A]t common law, every person is entitled to the inspection, either personally or by his agent, of public records ... provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.

*Fayette Co. v. Martin*, 130 S.W.2d 838, 843 (Ky. 1939). See also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); 76 C.J.S. *Records* §63 (1994). The Maryland courts appear to have adopted this rule. See, e.g., *Belt v. Prince George's Abstract Co.*, 73 Md. 289, 291, 20 A. 982 (1890). This perspective on public access to governmental records under the common law is reflected in a 1956 Attorney General's opinion which emphasized that records could not be inspected merely "to satisfy any whim or fancy." 41 *Opinions of the Attorney General* 113 (1956).

The two main liberalizations of most modern public information laws, including Maryland's, are the abrogation of a personal "legal interest" requirement to obtain record access and the inclusion of a wide range of public records that are available for public inspection.

Maryland's original act is very similar to those of Wyoming and Colorado and one, or both, was obviously used as a model. For a review of state public information acts, see Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720 (1981). The leading treatise on FOIA also contains a chapter on state laws. 2 James T. O'Reilly, *Federal Information Disclosure* Ch. 27 (3d ed. 2000).

In many circumstances, FOIA and cases under the federal statute are persuasive in interpreting the PIA. The United States Department of Justice publishes an extensive guide to FOIA titled *Freedom of Information Act Guide & Privacy Act Overview* (May 2004 ed.), available on-line as Freedom of Information Act Guide, <[www.usdoj.gov/o4foia/foi-act.htm](http://www.usdoj.gov/o4foia/foi-act.htm)>.

## **A. Scope of the PIA**

### **1. Public Agencies and Officials Covered**

The PIA covers virtually all public agencies or officials in the State. It includes all branches of State government (legislative, judicial, and executive). On the local level, the PIA covers all counties, cities, towns, school districts, and special districts. *See* SG §§10-601 and 10-611(g)(1)(i). (The statute has included the term "unincorporated town" since its inception, although that term is undefined and it is not clear what, if any, entities, it encompasses.)

The PIA also applies to any unit or instrumentality of the State or a political subdivision. SG §10-611(g)(1)(i). *See, e.g., Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975) (Memorial Hospital of Cumberland is an agent of City of Cumberland). Even agencies that receive no public funds but are created by statute may be subject to the PIA. The Court of Appeals, overruling a lower court, held that one such agency, the former Maryland Insurance Guaranty Association, was subject to the PIA. *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983). The Court considered whether the entity served a public purpose, was subject to a significant degree of control by the government, and was immune from tort liability. *See also* 86 *Opinions of the Attorney General* 94 (2001)

(proposed citizen police review board, established by municipal ordinance and funded and staffed by municipality, and performing public function would be unit or instrumentality of municipal government for purposes of PIA).

A nonprofit entity incorporated under the State's general corporation law may also be considered a unit or instrumentality of a political subdivision for purposes of the PIA, if there is a sufficient nexus linking the entity to the local government. *See Baltimore Development Corp. v. Carmel Realty Associates*, \_\_\_ Md. \_\_\_, 2006 WL 3104641 (2006) (nonprofit corporation formed to plan and implement long range development strategies in city subject to substantial control by city and thus was instrumentality of city subject to PIA). *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 724 A.2d 717, *cert. denied*, 353 Md. 473, 727 A.2d 382 (1999) (Salisbury Zoo Commission subject to PIA, given the Mayor and City Council's role in the appointment of Commission members, authority over budget and by-laws, and power to dissolve Commission); Letter of Assistant Attorney General Kathryn M. Rowe to Delegate Kevin Kelly (August 3, 2006) (concluding that volunteer fire department is not a unit of government subject to the PIA).

The PIA covers a broader range of government entities than some other public records laws like FOIA, since it covers all "public" records, not just those of "agencies," as FOIA does. Under the federal act, the immediate personal staff of the President is not included in the term "agency." As a result, records held by advisors to the President need not be disclosed under FOIA. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 155-56 (1980). Under the PIA, however, the Governor and the Governor's immediate staff are not automatically exempt. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249 (2000). As explained by the Court of Appeals, "cases deciding whether governmental documents are 'agency records' within the meaning of [FOIA] are not very pertinent in determining whether a governmental document is disclosable under the [PIA]." 360 Md. at 555.

The PIA does not apply to a private entity, such as a homeowners' association. However, other provisions of State law may provide for the retention and availability of records in specific contexts. *See* Annotated Code of Maryland, Real Property Article, §11-116 (books and records of council of unit owners of condominium); §11A-128 (books and records of time-share property); §11B-112 (books and records of homeowners association).

In light of the very broad scope of the PIA, the burden falls on any governmental entity or official asserting exclusion from the PIA to show that exclusion is consistent with a legislative intent to exempt that entity's or official's records from the PIA's general rule of disclosure.

## 2. Records Covered

All "public records" are covered by the PIA. The term "public record" is defined in SG §10-611(g) and includes not only written material but also photographs, photostats, films, microfilms, recordings, tapes, computerized records, maps, drawings, and any copy of a public record. *See* 81 *Opinions of the Attorney General* 140, 144 (1996) ("public record" includes both printed and electronically stored versions of e-mail messages); 71 *Opinions of the Attorney General* 288 (1986) (tape records of calls to 911 Emergency Telephone System centers are public records, but portions of the recordings may fall within certain exceptions to disclosure); 73 *Opinions of the Attorney General* 12, 24 (1988) ("public record" includes correspondence that is made or received by a unit of State government in connection with its conduct of public business). *See also* *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) (electronic version of e-mail message is a "record" under the Federal Records Act). A private document that an agency has read and incorporated in its files is a "public record." *Artesian Ind. v. Department of HHS*, 646 F. Supp. 1004, 1007 n.6 (D.D.C. 1986).

Public records are any records that are made by, or received by, a covered public agency in connection with the transaction of public business. The scope is broad, and all "records" possessed by an agency generally fall within the definition of "public records." For example, a database set up by a private vendor for use by a public agency for risk management purposes is a "public record." *Prince George's County v. The Washington Post Co.*, 149 Md. App. 289, 335, 815 A.2d 859 (2003) (remanded to allow government or vendor to demonstrate whether database fields qualify as vendor's proprietary intellectual property). Materials supplied to a legislative committee are public records normally available for inspection. Letter of Assistant Attorney General Kathryn M. Rowe to Delegate John Adams Hurson (May 14, 2004). Photographs posted on the Governor's website are public records. Letter of Assistant Attorney General Kathryn M. Rowe to Senator Roy P. Dyson (July 14, 2005). Individual criminal trial transcripts in the hands of the Public Defender are public records available for inspection and copying. 68 *Opinions of the Attorney General* 330 (1983). Similarly, prosecutorial files of a State's Attorney are accessible public records unless an exemption under the PIA applies. 81 *Opinions of the Attorney General* 154 (1996).

In addition, records gathered by a unit of State government that were given to the federal government to be used at a federal trial and not used exclusively at a State trial are still considered “public records” subject to disclosure, if the State agency has either the original documents or copies of them. *Epps v. Simms*, 89 Md. App. 371, 598 A.2d 756, 760 (1991).

The definition of “public record” explicitly encompasses the salaries paid to public employees, including bonuses and performance awards. SG §10-611(g)(2); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855; Opinion of the Attorney General No. 81-034 (November 23, 1981) (unpublished); 83 *Opinions of the Attorney General* 192 (1998). It also includes an employment contract of a public employee, evidencing how a publicly-funded salary is earned. *University System of Maryland v. The Baltimore Sun Co.*, 381 Md. 79, 89-90, 102-3, 847 A.2d 427 (2004).

Although most records located at a public agency fall within the definition of “public records,” some records might fall outside the definition. For example, the Supreme Court held that Henry Kissinger’s notes of telephone conversations, prepared while he was in the Office of the President, were not State Department records under FOIA, even though Dr. Kissinger had brought them with him to the State Department. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). The Court noted that “[i]f mere physical location of papers and materials could confer status as an ‘agency record’, Kissinger’s personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA.” 445 U.S. at 157.

Certain records in possession of the State may not qualify as “public records.” For example, records of telephone calls made from Government House, the official residence of the Governor in Annapolis, are not public records under the PIA. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 536, 759 A.2d 249 (2000). Similarly, personal matters and family engagements may properly be redacted prior to release of the Governor’s scheduling records under the PIA. *Id.*, 360 Md. at 543. In *Office of the Governor*, the Court of Appeals declined to address whether telephone message slips and an official’s individual appointment calendar that is not distributed to other staff are public records. *Id.*, 360 Md. at 555. *Cf. Bureau of Nat’l Affairs v. Dep’t of Justice*, 742 F.2d 1484, 1496 (D.C. Cir. 1984) (such records not “agency records” under FOIA), *see also Consumer Fed’n of America v. United States Dep’t of Agric.*, 455 F.3d 283 (D.C. Cir. 2006) (electronic appointment calendars of certain officials were “agency records” under FOIA); *Bloomberg, L.P. v. United*

*States Sec. and Exch. Comm'n*, 357 F.Supp. 2d 156 (D.D.C. 2004) (telephone message slips and computerized calendar created for personal use of SEC Chairman not “agency record”).

A private contractor’s own records are not “public records” if the agency does not possess them, even if the agency has a contractual right to obtain them. *Forsham v. Harris*, 445 U.S. 169 (1980). *See also* 80 *Opinions of the Attorney General* 257 (1995) (definition of “public record” does not extend to records that are required to be maintained by an applicant for a residential child care facility license, if they never come into the possession of a State agency). On the other hand, an agency’s records remain “public records” even if the agency outsources the task of maintaining them to a private contractor.

### ***B. Role of the Custodian and Official Custodian***

Central to the structure of the PIA are the roles played by the “custodian” and “official custodian” of the agency records. They are the public officials who must take actions under the PIA. Certain agency personnel may have key roles in responding to PIA. For example, the agency’s Public Information Officer may respond to inquiries from the press or the agency may designate a PIA coordinator to coordinate responses to certain types of requests. *See* Appendix F. These officials may or may not also perform the statutory functions of “custodian” or “official custodian.”

A custodian is any “authorized” person who has physical custody and control of the agency’s public records. SG §10-611(c). The “custodian” is the person who has the responsibility to allow inspection of a record and to determine, in the first instance, whether inspection can or should be denied. SG §10-613. The custodian is also responsible for preparing written denials when inspection is not allowed. SG §10-614(b). An agency official or employee who is not entitled by law to possess agency records may still become a “de facto” custodian and, therefore, become “authorized” within the meaning of SG §10-611(c) when he or she in fact has assumed custody of public records. 65 *Opinions of the Attorney General* 365 (1980).

The “official custodian” is the officer or employee of the agency who has the overall legal responsibility for the care and keeping of public records. SG §10-611(d). Usually, the “official custodian” will be the head of the agency. The official custodian is to consider designating specific types of public records of the unit that can be made available immediately on request and maintaining a list of such records. SG §10-613(c). The official custodian is authorized to decide whether to seek court action to protect records from

disclosure. SG §10-619. The official custodian is also the person who must establish “reasonable fee” schedules under SG §10-613.

SG §10-613(b) provides that, “[t]o protect public records and to prevent unnecessary interference with official business, each official custodian shall adopt reasonable rules and regulations that ... govern timely production and inspection of a public record.” A set of model regulations for State agencies is included in Appendix D.

The official custodian can also be the “custodian” of the records, depending upon who has physical custody and control of the records. SG §10-611(c).